ATTORNEY FOR APPELLANT:

ERIC E. SNOUFFER
Snouffer & Snouffer
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

JONATHAN H. NUSBAUM
Beers Mallers Backs & Salin, LLP
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

AMY MALCOLM,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 02A03-0606-CV-273
	)	
CONNIE M. ERCK,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Brian D. Cook, Judge
Cause No. 02D01-0601-PO-34

January 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Amy Malcolm (Malcolm), appeals the trial court's issuance of an Order of Protection against her.

We reverse and remand with instructions.

ISSUE

Malcolm raises two issues on appeal, only one of which we find dispositive, and which we restate as: Whether Malcolm was denied a hearing under Ind. Code § 34-26-5-10.

FACTS AND PROCEDURAL HISTORY

Malcom and Connie Erck (Erck) are sisters. On January 6, 2006, Erck filed a petition seeking an order of protection against Malcolm, alleging incidents of family violence and stalking, pursuant to I.C. § 34-26-5-10. An Ex Parte Order for Protection was issued on January 6, 2006. On January 31, 2006, Malcolm filed a request for hearing on the Ex Parte Order of Protection. The trial court set the matter for hearing on March 2, 2006, and the hearing was subsequently continued to May 25, 2006.

At the hearing on May 25, 2006, the trial court placed limits on the presentation of evidence and witnesses by each of the parties. Specifically, even though Malcolm and Erck had a tumultuous history, and Erck had alleged stalking in her petition, the trial court limited the evidence to an incident that occurred between Malcolm and Erck on January 4, 2006, at the Covington Plaza shopping center in Fort Wayne, Indiana. The evidence presented at the hearing was conflicting.

According to Erck, as she was getting out of her car to go into a store at Covington Plaza, Malcolm came up behind her and "grabbed the back" of her as she was half way out of her car. (Tr. p. 10). She claims that Malcolm grabbed her fists and pushed her back into her car, while yelling at her. Erck testified that, in an attempt to get Malcolm off of her, she told Malcolm that her husband was coming to meet her. She claims Malcolm then got out of Erck's car and went to her own vehicle, which was parked behind Erck's to box her in. Erck stated that she hurriedly removed her belongings from her own car and attempted to leave her vehicle. She claims, however, that as she did, Malcolm came over to where she was, kicked her car keys, which were lying on the ground, then picked up the keys and threw them across the parking lot. Erck alleges that after additional words were exchanged between her and Malcolm, Malcolm "cracked" her across the face. (Tr. p. 12).

On the other hand, Malcolm testified that she pulled in behind Erck's car at Covington Plaza. Malcolm claims that Erck was sitting in her own car with the door open when Malcolm walked up to Erck's car to talk with her; however, as Malcolm talked, Erck refused to respond. Malcolm alleged that she asked Erck, "why do you keep lying?" and Erck turned and looked at her with a "crazy look in her eye," and grabbed the back of Malcolm's hair. (Tr. p. 27). Malcolm claimed she pushed Erck toward the passenger side door "just to slide her over," upon which Erck released Malcolm's hair. *Id.* Malcolm testified that Erck then said she was going to call the police, and Malcolm crouched down next to Erck's car and told her to go ahead. According to Malcolm, Erck then made a very quick telephone call, put the phone down, and immediately put her

hands up. Malcolm claims she did not know what Erck was going to do, so Malcolm grabbed her hands. Malcolm states she asked Erck why she was doing this, and told her that her lying was not normal and that she needed to get some help for it. Next, Malcolm claims that she let go of Erck's hands and backed away from her vehicle; however, Erck immediately got out of her car as if she was coming after Malcolm. Malcolm testified that Erck dropped her keys, so Malcolm kicked them, but Erck continued to pursue her. According to Malcolm, Erck grabbed Malcolm's arms and they were in a "bear hug" until Malcolm pushed Erck away with her knee and got into her car. (Tr. p. 30). Malcolm testified that before she could lock her doors, Erck opened the passenger side door, leaned in and exchanged words with Malcolm.

On May 25, 2006, after a partial hearing of the evidence, the trial court issued an Order for Protection to Erck against Malcolm.

Malcolm now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Malcolm first contends the trial court denied her the right to a proper hearing pursuant to I.C. § 34-26-5-10. Specifically, she contends that the trial court denied her the opportunity to present relevant evidence and severely limited or excluded the testimony of competent witnesses. We agree.

It has been some time since we have had occasion to review the issue of whether it is appropriate for a trial court *sua sponte* to expressly and blatantly limit and even exclude the number of witnesses and evidence at a hearing or trial. As a general rule, the trial court should notify the parties of its intention to limit the number of witnesses before

any evidence is introduced. *Farmers' & Citizens' Bldg., Loan & Sav. Ass'n of Putnam County v. Rector*, 53 N.E. 297, 298 (Ind. Ct. App. 1899). Further, Ind. R. Evid. 403 states that evidence may be excluded if it is "cumulative." *See Allen v. State*, 787 N.E.2d 473, 479-80 (Ind. Ct. App. 2003), *trans. denied*; *Martin v. State*, 784 N.E.2d 997, 1008 (Ind. Ct. App. 2003), *reh'g. denied*.

As the case at bar requires us to define what constitutes a proper hearing, we find that it closely resembles the situation presented in *Essany v. Bower*, 790 N.E.2d 148 (Ind. Ct. App. 2003). Accordingly, we will rely heavily on the rationale this court set forth in *Essany* to define the term "hearing" under the Civil Protection Order Act ("CPOA"), I.C. § 34-26-5- 1 *et seq.*

In *Essany*, a woman filed a petition seeking a protection order under the CPOA against an alleged male stalker. *Id.* at 149. The trial court had granted an *ex parte* temporary protection order, and after one continuance, held a hearing on a permanent protection order. *Id.* at 149-50. At the hearing, the parties and counsel introduced themselves to the court, then in response to counsel's request to put his client on the stand, the court asked counsel to provide an explanation of the case, and counsel complied. *Id.* at 150. Thereafter, the court requested both parties to stand and administered the oath. *Id.* The court then asked petitioner if she agreed with everything her counsel just said; she said she did. *Id.* The court allowed respondent to respond to the allegations, then denied the petition for a permanent protection order, stating that petitioner had not "made out a case for stalking yet." *Id.*

In *Essany*, we reasoned that, "[o]ur legislature has dictated that [the] CPOA shall be construed to promote the: (1) protection and safety of all victims of domestic or family violence in a fair, prompt and effective manner; and (2) prevention of future domestic and family violence." *Id.* at 151 (quoting *Parkhurst v. Van Winkle*, 786 N.E.2d 1159, 1160 (Ind. Ct. App. 2003)). And where, as here, the trial court issues a protection order *ex parte*, provides relief under I.C. §34-26-5-9(b), and a party requests a hearing, the trial court shall set a date for a hearing on the petition. *Essany*, 790 N.E.2d at 151. *See* I.C. § 34-26-5-10-(a)(1). "The hearing must be held not more than thirty (30) days after the request for a hearing is filed unless continued by the trial court for good cause shown." *Id.* (quoting *Parkhurst*, 786 N.E.2d at 1160). However, as we stated in *Essany*, the legislature did not define the term "hearing" as it appears in the CPOA. *Essany*, 790 N.E.2d at 151.

The cardinal rule of statutory construction is to determine and give effect to the true intent of the legislature. *Id.* We endeavor to give statutory words their plain and ordinary meaning absent a clearly manifested purpose to do otherwise. *Id.* Where the General Assembly has defined a word, this court is bound by that definition, even if it conflicts with the common meaning of the word. *Id.* Where the legislature has used a word without definition, however, this court must examine the statute as a whole and attribute the common and ordinary meaning to the undefined word, unless doing so would deprive the statute of its purpose or effect. *Id.* Courts may consult English language dictionaries to ascertain the plain and ordinary meaning of a statutory term. *Id.* at 151-52.

Analyzing the statutory term, the *Essany* court noted that this court had previously defined a hearing as "a proceeding of relative formality held in order to determine issues of fact or law in which evidence is presented and witnesses are heard." *Id.* at 152 (quoting *Hunt v. Shettle*, 452 N.E.2d 1045, 1050 (Ind. Ct. App. 1983)). Further, a common dictionary definition of "hearing" provides:

> 3. An opportunity to be heard. 4. *Law*. a. A preliminary examination of an accused person. b. The trial in an equity case. 5. A session, as of an investigatory committee or a grand jury, *at which testimony is taken from witnesses.*

Essany, 790 N.E.2d at 152 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 833 (3d ed. 1992) (emphasis added)).

Black's Law Dictionary defines "hearing" as "[a] judicial session, [usually] open to the public, held for the purpose of deciding issues of fact or law, *sometimes* with witnesses testifying." *Essany*, 790 N.E.2d at 152 (quoting BLACK'S LAW DICTIONARY 725 (7th ed. 1999) (emphasis added)). By defining the term as a proceeding during which witnesses sometimes testify, we recognized in *Essany* that a hearing does not always contemplate the presentation of evidence or witness testimony. *Essany*, 790 N.E.2d at 152. Thus, confronted with somewhat different common meanings of the undefined term, the *Essany* court considered the goals of the statute and the reasons and policy underlying the statute's enactment. *Id.*

Next, the *Essany* court relied on I.C. § 34-26-5-16, which addresses fees and costs associated with protection orders, and provides that fees for filings, service of process, *witnesses*, or subpoenas may not be charged for a proceeding seeking relief from or

enforcement of a protection order. *Id.* (emphasis added). Accordingly, the court held that by addressing the fees and costs associated with witnesses, that section further supports the conclusion that when the legislature provided for hearings under the CPOA, it intended that the petitioner, and the respondent if present, be permitted to call witnesses at those hearings. *Id.*

Here, the record shows that the trial court did not notify the parties of its intention to limit the number of witnesses prior to the introduction of evidence. *See Farmers' & Citizens' Bldg., Loan & Sav. Ass'n of Putnam County*, 53 N.E. at 298. After noting that there were "quite a few people" present, and asking anyone who would be testifying in the matter to raise their right hand to be sworn in, the trial court stated:

> Counsel I'm going to direct you – ladies your – both of your attorneys have been through this before and they know what they're doing so we're going to expedite things and get to the punch on this basically. Clearly there's a background on some of these issues and and (sic) they can give me a brief background and I know that's extremely important to the both of you but I have to get into as you saw with the previous hearings stalking, domestic violence or sexual assault. Clearly what we have here, um, in this situation is you are related by blood or marriage therefore we can have domestic violence or stalking in this situation and I do not see any allegations of sexual assault here. Um, we will get into briefly what your relationship is and then we will get into, uh, the issue revolving around the Covington Plaza parking lot where you are alleging that there was a physical altercation and then we'll work backward.

(Tr. pp. 7-8). The record further reflects that the trial court took note of the number of witnesses present in the courtroom; however, it never took the opportunity to advise counsel they would be limited in the number of witnesses they could present. It was only as the hearing proceeded and as the presiding magistrate expressly directed each attorney which witness he wanted to hear from next, did Malcolm realize she would not be

permitted to fully present her case and call the witnesses she intended. After both Erck and Malcolm had given limited testimony, the trial court engaged in the following exchange with Erck's counsel:

> [TRIAL COURT]: Okay. Do we have any eyewitnesses here today that watched this event in the parking lot?
>
> [COUNSEL]: No.
>
> [TRIAL COURT]: Okay. I want to hear from the officer. I'm assuming the officer was the first person to speak to the two of them, or at least one of them on the scene after this event. Is that correct? Was the - - did the officer respond to the scene?
>
> [COUNSEL]: Yes. Ms. Malcolm had already left.
>
> [TRIAL COURT]: Okay. I want to hear from the officer very quickly…
>
> [COUNSEL]: Sure…
>
> [TRIAL COURT]: So [counsel] you may call her.

(Tr. p. 33).

In making its decision to enter the Order of Protection against Malcolm, the trial court concluded that this was a situation of mutual combat between family members. With regards to the self-defense exception raised by Malcolm under I.C. § 34-6-2-34.5, the trial court said it "[didn't] see that here." (Tr. p. 56). However, although severely limited, the record shows there was substantial conflict in the testimony of the two participants in the altercation.

As the record shows, Malcolm had several witnesses present in the courtroom the day of the hearing, prepared to testify on her behalf. Malcolm's attorney specifically stated that some of these witnesses would testify as to the character of the respective

parties. However, the trial court not only limited *all* testimony to the Covington Plaza incident, but moreover actively directed each attorney's presentation of evidence, hand-picking which witnesses from whom it wished to hear and the order in which it wished to hear them. Therefore, we find that the testimony of Malcolm's additional witnesses would not have been irrelevant or cumulative and, therefore, should not have been limited by the trial court. *See* Ind. R. Evid. 403.

Although the trial court allowed one of Malcolm's witnesses to testify, at the direction of the trial court, her testimony was strictly limited to details regarding an "excited utterance" she received from Malcolm immediately following the Covington Plaza incident. (Tr. p. 45). In compliance with the trial court's stipulations, when the witness deviated from this testimony, Malcolm's attorney refocused her attention to the incident at issue.

The record shows the trial court's decision to severely limit the number of witnesses and evidence Malcolm was permitted to present effectively denied Malcolm her right to a proper hearing under I.C. § 34-26-5-10, and was clearly erroneous.

CONCLUSION

Based on the foregoing, we find Malcolm was denied a proper hearing pursuant to I.C. § 34-26-5-10; therefore, this cause is reversed and remanded for a proper hearing pursuant to I.C. § 34-26-5-10.

Reversed and remanded.

BAILEY, J., and MAY, J., concur.